

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,378

United States Court of Appeals
For the
District of Columbia Circuit

FILED JUN 13 1958

Joseph W. Stewart

CLERK

MERVIN GREEN,

Appellant,

v.

50

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

PLEADINGS AND DOCUMENTARY EVIDENCE

122 [Filed Sep. 23, 1957]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES	)	Criminal 1045-57
v.	)	Grand Jury 1132-57
MERVIN GREEN	)	Criminal Case 1045-57

MOTION TO SUPPRESS ILLEGALLY
OBTAINED EVIDENCE AND DISMISS
CHARGES

Your Movant, Mervin Green, moves that this Honorable Court will issue an order to suppress the use of such illegally obtained evidence as was obtained by agents of the Metropolitan Police Department through the illegal arrest and search of your movant on August 26, 1957 at 11:20 A. M. and for the information of the court sets forth the following circumstances--

Your Movant states that on the morning of August 26, 1957, he was arrested by agents of the Metropolitan Police Narcotic Squad because he was seen walking on "R" St. N.W. in the company of a "known" drug addict. The arresting officers gave this as the sole reason for the arrest and subsequent search. They admittedly based their arrest on mere "suspicion" and on no overt act by your movant. The arrest and search of your movant disclosed heroin which was seized and your movant was charged with the illegal possession of.

Your Movant contends that his arrest and search were illegal as the police did not have a warrant as provided for in amendment IV of the Constitution of the United States and Rule 4(a) and 9(a) of the Federal Rules of Criminal Procedure.

U. S. v. Hill 114 Fed. Supp. 441 (D.C. Ct. App. 1953). Chief Judge Laws Ruled that "Mere suspicion of a third party, however reliable, without

personal observation - Stake out - or surveillance would be of itself insufficient to either issuance of a warrant or a search without a warrant.

U. S. v. Dire, U.S. 581, 595 (1948) -- "Illegal Arrest is not made legal by what it turns up -- in law it is either good or bad when it starts and does not change its character from its success."

D. C. v. Little, 178 -- F. 2d -- 13.18 -- (D.C. App. Ct. 1949) -- "Patting Down A Person as soon as arrested wrongfully is a violation of the IV Amendment -- U.S. Const. --"

Conti v. U.S. -- 215 F. 2d 324. "Mere suspicion is in itself not probable cause...."

123 Your Movant contends was based on "mere suspicion" and the arresting officers were not investigating any reported crime in which he could be implicated or a suspect and the arrest and subsequent search were illegal as the arresting officers did not have probable cause for an arrest without a warrant. Your Movant further contends the proceeds of such an illegal search are further illegal and should be suppressed.

PRAYER

Your Movant prays that this court will grant him a prompt hearing on this motion and upon a determination of the facts and conclusions of law issue an order suppressing the use of the illegally obtained evidence. Your Movant further prays that this court will see fit to dismiss any and all charges growing out of the arrest and appoint legal counsel to represent your Movant in any proceedings before this court. For this relief your Movant prays.

/s/ Mervin Green

* * * * *

125 [Filed in Open Court Nov. 4, 1957] Vio. 26 U.S.C. 4704a
21 U.S.C. 174

* * * * *
Grand Jury Impanelled August 29, 1957, Sworn in on September 3 1957
The Grand Jury charges:

Unlawful Entry (22 D.C.C. 3102)
On or about August 26, 1957, within the District of Columbia,
Mervin Green purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, two hundred twenty-nine capsules containing a mixture totaling about 432.5 grains of heroin hydrochloride and milk

sugar.

SECOND COUNT:

On or about August 26, 1957, within the District of Columbia, Mervin Green facilitated the concealment and sale of a narcotic drug, that is, two hundred twenty-nine capsules containing a mixture totaling about 432.5 grains of heroin hydrochloride and milk sugar, after the said heroin hydrochloride had been imported, with the knowledge of Mervin Green, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

THIRD COUNT:

On or about August 26, 1957, within the District of Columbia, Mervin Green did unlawfully attempt to enter a certain private dwelling, that is, 53 R Street, Northwest, against the will of Mary Briggs, the lawful occupant thereof.

/s/ Oliver Gasch

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ William E. Mattingly
Foreman.

126 [Filed Nov. 6, 1957]

MOTION TO SUPPRESS EVIDENCE

Comes now the defendant herein by counsel and moves the Court for an order suppressing certain evidence seized from him or allegedly seized from him, to wit: narcotics, by officers of the Metropolitan Police Department on 26 August, 1957. Defendant states that said officers had no warrant for his arrest, saw no crime committed and were without any probable cause to effect said arrest.

/s/ JOHN J. DWYER
602 5th St., N.W.
Attorney for defendant

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128

[Filed Nov. 15, 1957]

* * * * *

On this 15th day of November 1957, came the attorney of the United States, the defendant in proper person and by his attorney, John J. Dwyer Esquire; whereupon the defendant's motion to suppress evidence coming on for hearing, after argument by counsel, is by the Court denied without prejudice.

By direction of

Edward A. Tamm
Presiding Judge
Criminal Court #3

* * * * *

129

[Filed Dec. 31, 1957]

* * * * *

MOTION TO SUPPRESS ILLEGAL EVIDENCE

Your petitioner, Mervin Green, moves that this court suppress the use of such evidence (heroin) as was obtained by the arresting officers through an illegal arrest search and seizure, in the support of this motion your petitioner sets forth the following facts, circumstances and legal authorities.

1. Your petitioner presented for filing at an earlier date a motion to suppress evidence. Counsel for your petitioner, Mr. John J. Dwyer, withdrew your petitioner's motion and substituted a motion of his own, this was not at your petitioner's behest or with his consent. The motion filed by Mr. Dwyer was denied without prejudice by the Honorable Judge Tamm on Nov. 15, 1957. The basis for denial of the motion was on the doctrine set forth in Corland v. U.S. 197 F. 2d 685 "A person who disclaims ownership of certain property has no standing to urge such property was seized illegally". This doctrine was rejected by the United States Court of Appeals for the District of Columbia in the case of Williams v. U.S. 237 F.2d 789 (C.A.D.A.). In a decision by the U. S. Court of Appeals (D.C.) on Dec. 10, 1957. Ernest Jackson v. U.S. the Court further affirmed the

new doctrine of the Williams case. This argues that the IV ammendment of the Constitution of the United States is an absolute guarantee against the illegal search of a citizen by a police officer without a warrant. A citizen's person is as inviolate as his home to a search without a warrant.

2. Your petitioner has contended that the arresting officers did not have probable cause to arrest and search your petitioner without a warrant. The arresting officers (Officer Brewer and Kalinski) have stated that their cause for arresting and searching your petitioner was because they observed him walking down the street in the company of a known drug addict by the name of John Palmer. For the information of this court your petitioner states that he was walking down the unit block of 'R' St., N. W. at 10:15 a. m. August 26, 1957 when two men came running at him in a gesturing threatening manner. Both of these men were dressed in civilian clothing and made no effort to identify themselves or explain their intentions. These two men subsequent to the arrest and search of your petitioner identified themselves

130 to be police officers. When these two un-identified men first came running at your petitioner in a threatening and menacing manner your petitioner's reaction was to obtain help or sanctuary. Your petitioner fled up the front steps of an adjacent house and shook the door in an effort to arouse the occupant therein. It can only stand to reason that a person in fear of some real or even imaginary danger is not going to be concerned with a "Don't step on the grass sign." Prior to the petitioner being threatened by the menacing manner in which the police officers approached him he had been observed by them to have committed no illegal or otherwise overt act whereby they would have had probable cause to set upon him and make an arrest and search without a proper warrant (emphasis added). When a subsequent charge and indictment was filed the arresting officers manufactured an overt act in an attempt to legitimize an unlawful arrest and search by placing a false and frivolous charge of "attempted un-lawful entry" against your petitioner - this charge was "manufactured probable cause" (emphasis added).

3. Your petitioner contends that the arresting officers acted on mere suspicion because he was seen to be walking down the street in the company of a known drug addict. Mere suspicion is not probable cause. See: U.S. v. Hill, 114 F. 441 (D. D. C. 1953) Chief Judge Laws ruled "mere information or suspicion of itself would be insufficient to either issuance of a warrant

or a search without a warrant." Also see: D.C. v. Little, 178 F. 2d 13-18 (D.C. App. Ct. 1949) "Patting down a person as arrested wrongfully is a violation of the IV ammendment". See: U.S. v. Dire, ___ U.S. 581, 595 (1948) "Illegal arrest is not made legal by what it turns up. In law, it is either good or bad when it starts and does not change it's character from it's success. Radiation from this principle requires the deterance of wrongful police action."

4. Your petitioner urges upon this court the argument that the IV amendment of the Constitution of the United States accords to every citizen the right to walk the streets without the fear of being seized up arrested and searched unless with the authority of a legitimate warrant, or probable cause as set forth in the foregoing decisions and countless other decisions of the same portent. Your petitioner feels this court will recognize the third
131 count of the indictment against your petitioner alleging the crime of "attempted un-lawful entry" to be exactly what it is, a manufactured overt act. The arresting officers knew that they had acted on mere suspicion which would not constitute the required probable cause to make an arrest and search without a warrant. The arresting officers and the U.S. Attorney who drew up the indictment knew the arrest and search were illegal so in order to confuse the legal issues, they tried to manufacture probable cause by creating such a question as to which came first. There can remain no doubt that your petitioner committed no observable crime or otherwise overt act until set upon by two un-identified police officers in civillian clothing, who came at your petitioner in such a threatening and menacing manner, to instill such fear of bodily harm that he was unable to observe the niceties of a "don't step on the grass sign".

PRAYER

The foregoing premises considered your petitioner prays that this court will grant a hearing on this motion promptly and will closely examine the facts and law at issue and render a decision in accordance with the law. Your petitioner prays that this court will issue such orders as necessary to suppress the use of the illegally obtained evidence. For this relief your petitioner prays.

Your petitioner, Mervin Green, signs and submits this motion in good faith this 29th day of December 1957.

/s/ Mervin Green, 200 19th St., S. E., D. C.

132

[Filed Jan. 3, 1958]

200 19th St., S. E.
Washington, D. C.

Honorable Judge Laws,

Sir;

I write this letter in regards to a rehearing of my motion "To suppress illegally obtained evidence and dismiss the charges," which was presented, and was denied without prejudice before the honorable Judge Tamm, on Nov. 15, 1957.

I ask that my motion be reheard because of the following circumstances; My lawyer, John J. Dwyer, who was retained as counsel, by a relative for my defence, withdrew my original motion, "To suppress illegally obtained evidence and dismiss the charges," without my consent or approval, and improvised a motion he attempted to argue verbatim, which was contrary to the title and the substantiation of my original motion, and through-out the procedure in arguing my motion, there was no testimony heard from the arresting officers, nor was there a complainant witness to give testimony concerning a charge of, "Unlawful Entry", that the grand jury indicted me on, as a third count in support to my charge.

I hope your honor will consider this letter, and grant me a rehearing of my motion, I would appreciate also, if your honor, would appoint to me a counsel for my defense.

Respectfully

Mervin Green - 79414

Rec. 1/2/58

Tamm, J.

133

[Filed Feb. 26, 1958]

* * * * *

MEMORANDUM OPINION

The defendant's motion for a new trial is denied. Sec. 140, Title 4, D.C. Code.

/s/ Edward A. Tamm, Judge

Dated: 2/25/58

Denied.
Tamm J.
1/2/58

134 [Filed Jan. 10, 1958]

* * * * *

On this 10th day of January 1958 came the attorney of the United States; the defendant in proper person and by counsel John J. Dwyer; whereupon the motion of the defendant to suppress evidence coming on to be heard after argument by counsel is by the Court denied.

The defendant is remanded to the District of Columbia Jail.

By direction of

DAVID A. PINE

Presiding Judge

Criminal Court #2

* * * * *

135 [Filed Feb. 11, 1958]

* * * * *

On this 11th day of February, 1958, came the attorney of the United States; the defendant in proper person and by attorney John J. Dwyer, Esquire; whereupon the jurors of the regular Petit Jury panel serving in Civil Court No. , being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

- | | |
|--------------------------|---------------------|
| 1. Agnes T. Bakajza | 7. John F. Lee |
| 2. Nancy B. Burkhardt | 8. Hannie M. Outlaw |
| 3. Joseph L. Wathen | 9. Helen M. Powell |
| 4. Lilliam M. Dofflemyer | 10. George L. Reuss |
| 5. Lillian Eichner | 11. Louis Robbins |
| 6. Bertha Atkinson | 12. Joan E. Davis |

who are sworn to well and truly try the issue joined herein; whereupon the jurors upon their oath say that they find the defendant guilty on counts one and two; not guilty on count three. The case is referred to the Probation Officer of the Court and the defendant is remanded to the District Jail.

By direction of

Edward A. Tamm

Presiding Judge, Criminal Court #5

[Filed Feb. 13, 1958]

MOTION FOR A NEW TRIAL

Comes now the defendant herein by counsel and respectfully moves the Court for a new trial and or to direct a verdict, notwithstanding the verdict of the jury.

For reason, therefore, defendant states that he challenged the arrest on the lack of any probable cause under Williams v. U. S., U. S. Court of Appeals for the District of Columbia Circuit decided 11 October 1956, number 13369. The Court apparently decided this action on Bell v. U. S. decided by this circuit on 23 January, 1958, number 13684. The Courts attention is invited to the factual situation in the instant action. Two police officers testified that they pulled beside the defendant and a known drug addict, called to them, defendant ran and one officer ran after, defendant ran up to the front door of a house nearby and the woman outside spoke to him. The woman testified that she did not call the police but that when she told the officers to take him from the yard, the officer told her he "wanted him anyway". The jury found defendant not guilty of attempted unlawful entry and neither defendant nor his companion was doing anything unusual or suspicious and it was during the late morning hours of a week day.

It is submitted that this case closely coincides with the factual situation obtaining in the Williams and differs completely from that in the Bell case where in the early hours of the morning a car pulled away from the curb without lights.

/s/ John J. Dwyer

602 5th St., NW
Attorney for defendant

* * * * *

[Filed Mar. 10, 1958]

NOTICE OF APPEAL

Name and address of appellant

MERVIN GREEN

200 19th St., S.E.,
Washington, D. C.

Name and address of appellant's attorney

Offense: 4704a of Title 26 and Title 174 of Title 21, U. S. Code

Concise statement of judgment or order, giving date, and any sentence

Guilty of both above

Name of institution where now confined, if not on bail

D. C. Jail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated judgment.

Date 3-10-58

/s/ Mervin Green

Appellant

139 [Filed Mar. 11, 1958]

* * * * *

On this 7th day of March, 1958 came the attorney for the government and the defendant appeared in person and by counsel, John J. Dwyer, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

Violation of Section 4704a, Title 26 of the U. S. Code;

Violation of Section 174, Title 21 of the U. S. Code

as charged in counts one and two and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Three (3) years to Ten (10) years on count one;

Six (6) years on count two, said sentences by the counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward A. Tamm,

United States District Judge

1 EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

[Filed April 17, 1958]

* * * * *

February 11, 1958

The above-entitled cause came on for trial before the HON. EDWARD A. TAMM, a District Court Judge, and jury at 10:00 a. m.

APPEARANCES:

VICTOR W. CAPUTY, ESQ.

Assistant U. S. Attorney,
for the Government.

JOHN J. DWYER, ESQ.,

for the Defendant.

* * * * *

10 OPENING STATEMENT ON BEHALF OF DEFENDANT

MR. DWYER: May it please the Court, ladies and gentlemen of the jury, we will show you that on this particular day in question, I believe it was August 26, the defendant was walking down the street with an acquaintance of his, that he was gainfully employed at that time, he was minding his own business, he was breaking no laws. That it was in the early hours of morning, I believe 10:30 or 11:00 o'clock. That as he was walking down the street, a car pulled up, two white men dashed out of the car and ran. He was in fear, he didn't know what was going on, but they did not identify themselves. That he ran away from them, expecting bodily harm. He ran up on a porch trying to get away from them. They

chased him up there and at that time they placed him under arrest. They brought him back to their car which turned out to be a police cruiser and they identified themselves as being police officers. At that time they held out to him a handkerchief with capsules in it and they said, "Well, this is what we picked up that you dropped." We expect that the evidence, all the evidence will show you that this defendant was only leaving because he was in fear of his life and that he did not actually possess anything at all. At the proper time we will ask you for an appropriate verdict.

* * * * *

11

METRO KRENITSKY

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

Q. And how long have you been assigned to the Narcotics Squad of the Metropolitan Police Department? A. Since October of 1956.

* * * * *

12

Q. Early in the morning of August 26, 1957, can you tell us whether you were in the unit block of R Street, Northwest. A. I was.

Q. About what time of the day? A. At about 11:15 a.m.

Q. Any other officer with you? A. Officer Brewer.

Q. Were you walking or were you in a vehicle? A. We were in a police cruiser.

Q. Will you tell the Court and jury whether you had seen anyone whom you had known when you were in that police cruiser in the unit block of R Street, Northwest? A. At about 11:15 a.m., on August 26, Officer Brewer and myself were investigating narcotic activities in the vicinity

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at North Capitol and R Streets, Northwest. At about 11:15 a.m., we came off North Capitol Street and headed west on R Street. While in the unit block of R Street, we observed two colored men walking west on the north side of the street. We immediately identified one as John Arthur Palmer, a known narcotic addict. When we pulled abreast of the two colored men, we stopped the car and called the two men over to the car.

Palmer stopped and he came towards the car. At that time the defendant immediately started to run and he ran into the yard of 53 R Street, Northwest, and he tried to get into the door. There was a colored woman sitting on the bench in the front yard, and she told the defendant to get out of there, "You don't belong there."

At that time Officer Brewer proceeded after the defendant, and the defendant started struggling with him. I told Palmer to stand there where he was, the man I apprehended, and he stood there and I went to assist Officer Brewer. I identified myself to the defendant as a police officer and he still started to struggle. It was necessary for us to use a little force to retain him.

We did subdue the defendant and we asked him what he had in his pocket, and he stated that he had some stuff on him, meaning heroin. He said that he would reach into his pocket and hand us the stuff and we told

14 him not to put his hand into his pocket, that we would take it out for him. I reached into his pants pocket, the right hand pants pocket, and came out with a brown manila envelope and I looked into it and immediately noticed there were quite a few white capsules in there. I asked him who the stuff belonged to and the defendant said that it was his stuff. And at that time we put him in the cruiser and took him to the narcotics squad office.

In this package that we retrieved from the defendant contained 229 capsules and a preliminary field test was conducted at the narcotics squad office on one of the capsules which indicated it contained heroin.

Q. Now, can you tell us whether the lady seated out in front, in addition to what she said, "You don't belong here, get out of here," did she direct any words to you people? A. Yes, sir. She told us to take the man out of there, he don't belong there, and to take him out of the yard, which we did. We took him out into the street, the front of the premises, and at that time we put him in the car and tried to get him out of there as fast as possible, not to arouse any noise.

Q. And who recovered the capsules? A. I took the stuff out of his pocket.

Q. And what did you do with them after you recovered them?

A. Well, at the narcotics squad office, I turned them over to Officer Brewer. I initialed the envelope and turned the stuff over to Officer Brewer.

* * * * *

Q. Showing you, sir, what has been marked as Government's Exhibit 1-A for identification, I ask you to look at it, examine it and tell us whether you can identify it. A. I identify this package with my initials on it, "MK, 8-26-57, at 11:30 a.m." in front of 53 R Street, Northwest.

Q. When was it that you first saw Government's Exhibit 1-A for identification? A. At the time of the defendant's arrest.

16 Q. Were those capsules at the time of the defendant's arrest in that envelope, sir? A. Just as it is.

* * * * *

17 Q. Now, at the time you recovered Government's Exhibit 1-A for identification, the envelope, can you tell us whether Government's Exhibit 1-A for identification and its contents, the capsules, came from the original stamped package or whether they had any stamps on them? A. No, sir, there is no stamps on here.

* * * * *

18 Q. Now, all this took place in the District of Columbia? A. It did, sir.

* * * * *

CROSS EXAMINATION

BY MR. DWYER:

* * * * *

23 Q. Did you know the defendant before this day? A. I personally did not, no, sir.

Q Did you know the other man before this day? A. I did.

Q. Did you see the defendant do anything? A. No, sir.

* * * * *

24 Q. And you yelled, "Hey," and then the defendant you say started

to run? A. We called him over to the car, called "Jap" Palmer to come over to the car, and Palmer did stop, but the defendant did not. He just ran east and tried to get into premises 53 R Street.

* * * * *

28 Q. Let me understand you, officer. You say that when you arrived in front of the house, the defendant was on top of the steps and Brewer was down below? A. That is right.

Q. Am I correct? Well, what happened to the struggle between them? A. They were struggling.

Q. The defendant was above and Brewer was below and they were struggling? A. They were struggling at the door. Then later Brewer was down at the foot of the steps.

Q. Wait a minute, wait a minute. There were four or five steps up to this landing; is that correct? A. That is correct.

* * * * *

30 Q. And was there any -- were there any other people present? A. The lady that was sitting in front of the premises.

Q. And where was she sitting? A. She was sitting at a bench. As you come up to the steps, it would be on the left as you enter the premises. That was on the ground, not on the porch, but there was a wooden bench at the foot of the steps leading from the sidewalk into the yard.

* * * * *

31 Q. Now officer, just please answer my question. When you came up to the door of this woman's house, up to the front steps, and saw Brewer standing there, how far away was the woman? A. I couldn't say.

Q. Can you estimate? A. No, sir.

Q. Can you estimate in this Court room? A. I would say between you and myself. It would be about 10, 15 feet. I wasn't interested in the woman.

* * * * *

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REDIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

38 Q. Do you see the defendant in the Court room? A. Yes.

Q. Point him out. A. That is him setting right there (pointing).

* * * * *

39

RECROSS EXAMINATION

BY MR. DWYER:

Q. Let me ask you this: When you got them from the defendant, were they loose? A. They were in that brown Manila envelope.

Q. Which brown Manila envelope? This one that has been identified? A. That is the one.

Q. That one? A. Yes.

Q. In what pocket were they in? A. The right hand pants pocket.

Q. You went into his pocket and pulled them out? A. That is right.

* * * * *

IRVIN W. BREWER

* * * * *

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DIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

41 Q. By "we", whom do you mean? A. Officer Krenitsky and myself were cruising west in the unit block of R Street, Northwest.

Q. Now, when you were cruising there in the unit block of R Street, Northwest, did you come upon someone whom you recognized, sir?
A. Yes, sir. We come upon, right in front of 53 R Street northwest, I observed two colored men. One, "Jap" Palmer, and the other, the defendant.

Q. And who was "Jap" Palmer? A. "Jap" Palmer is a narcotic addict.

Q. Known to you as such? A. Yes, sir, he is.

Q. Well, tell us from that point on what, if anything, you did or said from that point on. A. I called over to "Jap" Palmer and as the cruiser stopped, I got out of the car in an effort to ask him about his narcotic activity and as I did, this defendant (pointing) ran up the steps and

passed a lady, Mrs. Mary Briggs, who was seated on the bench at 53 R Street, at which time she asked him, "Where are you going? Get away from the door." And at that time he pulled something out of his right hand pocket. It was a brown envelope. Then put it back in, then grabbed hold of the door and tried to open the door, and at that time I placed him under arrest.

Q. You are pointing at someone. Whom are you pointing to here in Court? A. The defendant.

42 Q. Which one is it? A. The colored man with the brown jacket and the mustache.

MR. CAPUTY: May the record show, if Your Honor please, that he has identified the defendant.

THE COURT: The record will indicate that the witness has identified the defendant.

BY MR. CAPUTY:

Q. Now, will you tell us whether Mary Briggs said anything else other than what you have just testified to? A. She told us, "Please take him away from here." He didn't live there.

* * * * *

43 Q. At the time that you arrested him there, was anything said by him there out in the street? A. Yes, sir. I asked him, I said, "Do you have any stuff on you?" And he said he did. He says, "It's in my right pants pocket." He wanted to get it for me, and I said, "No, just hold your hands and we'll let Officer Krenitsky retrieve the evidence."

Q. Now, what have you done with Government's Exhibit 1-A for identification from the time that it was turned over to you? A. I sealed this evidence and delivered it to the United States Chemist on August 27th, the next day, around 10:00 o'clock in the morning.

44 * * * * *

Q. Did you turn it over to the chemist? A. Yes, sir.

Q. What day? A. Doctor Butler, August 27.

* * * * *

CROSS EXAMINATION

BY MR. DWYER:

* * * * *

47 Q. Did you know the defendant before that day? A. Did I know him?

Q. Yes, sir. A. I knew of him, yes, sir.

Q. Did you know him? A. No, I would say I didn't know him. I knew of him.

Q. Did you see him? A. I knew him by pictures.

Q. Have you seen him before? A. Not to my recollection, no, sir.

Q. Was he doing anything unusual when you first saw him that day? A. He was walking with "Jap" Palmer and when we stopped --

Q. Was he doing anything unusual up until the time you saw him, up until the time you stopped, I mean? A. No, sir.

Q. Was "Jap" Palmer doing anything unusual until the time that you stopped? A. No, sir.

* * * * *

50 Q. Now then, he ran up the steps of the house directly beside your car? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

51 Q. Where was the woman when he ran up the steps? A. She was sitting on the front bench.

Q. Is that front bench beside the front walk? A. It is near the front walk, yes, sir.

Q. About how many feet would you say that was from the steps? A. Oh, it is a distance of eight to ten feet altogether.

Q. Did she remain sitting there all the time when you were there? A. No, sir.

Q. Where did she go? A. She got up and told us to please take him away from there, he didn't live there.

Q. After the defendant ran from where he was standing with the other man up the steps, you took off after him right away; is that correct?

A. Yes, I did.

Q. Were you running? A. No, sir.

Q. You were walking? A. At a fast gait, yes.

Q. And the defendant was running? A. Yes, sir.

Q. You didn't feel you had to run to catch him? A. Well, the time he bounced off the door and bounced right back into my arms.

52 Q. I see. You were right behind him then. A. Well, comparatively speaking, yes, sir.

Q. Is there a set of steps going up to these doors? A. Yes, sir.

Q. And you were at the top of the steps when he bounced into your arms? A. Yes, sir.

Q. Then did you place him under arrest? A. Yes, sir.

Q. Did you identify yourself? A. At that time he knew who I was.

THE COURT: No. Answer the question.

THE WITNESS: No, I didn't.

BY MR. DWYER:

Q. Did you lead him down the steps at that time? A. Did I lead him down? Officer Krenitsky came up about that time and helped me to maintain the arrest.

Q. Let me fully understand what happened at the top of the steps now. You say he bounced off the door into your arms and you held on to him; is that correct? A. Yes.

Q. This is at the top of the steps? A. Yes, sir.

Q. Then Krenitsky came up the steps and he also held on to him; is that correct? A. Yes, sir.

53 Q. Was it at that time you led him down the steps? A. It was about that time, yes, sir.

Q. Had the woman said anything to you prior to this? A. Well, she had said -- she made a statement, yes.

Q. What did she say and when did she say it before the defendant bounced off the door? A. As he was going past, she asked him, she says, "I live here, where are you going?" And then he tried the door

and she said, "Get away from the door."

Q. And how far away from you was the woman at this time?

A. She was about two or three feet.

Q. That was when the defendant was going by her, so you were only two or three feet from the defendant? A. Yes, sir.

Q. But you were just walking on his heels, or so to speak, two or three feet? A. Close behind him, yes.

Q. And you made no effort to catch him. You didn't run to catch him? A. No, I didn't have to run.

Q. Why did you arrest the defendant, Officer? A. Well, when I found out he didn't live there, we arrested him for attempted unlawful
54 entry.

Q. Did Krenitsky ever identify himself as a police officer? A. He did as he came up, yes, sir.

Q. As he came up? A. Yes, sir.

Q. What was he going, flashing his badge as he ran up the steps? A. I believe he was, yes, sir.

Q. And when did you search him, the defendant, that is? A. We didn't search him until he got back to the car, back to the cruiser door of the car.

* * * * *

55 Q. Was there any conversation with the defendant and the other man on the way to headquarters? A. As I recall, at that time we asked him where he got the 229 capsules from and he told us it was from some man in the vicinity of 6th and O Street. He didn't know what his name
56 was.

* * * * *

57 Q. You don't know where the exhibit came from, do you? A. I don't know where the exhibit come from?

Q. Yes. A. Yes, I sure do.

Q. You didn't get it, did you? A. I didn't get it. I was present when it was retrieved.

* * * * *

59

MARY BRIGGS

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

60 Q. And where do you live, Mrs. Briggs? A. 53 R Street, Northwest.

Q. In the District of Columbia here? A. Yes, I do.

Q. And were you living there on August 26, 1957? A. Yes, sir, yes, I was.

* * * * *

Q. Now, were you home on August 26, 1957, ma'am? A. Yes, I was.

Q. Now, in the morning of that day, can you tell us whether you were inside or outside the house? A. I was sitting on my bench in the front yard.

* * * * *

61 Q. Where is the bench in relation to the steps? A. It was sitting just a little bit from the steps.

Q. Now, on that day when you were seated on the bench, can you tell us whether someone came into your yard? A. Yes, they did.

Q. Tell us about that. A. Well, I was sitting on my bench and someone walked past me and walked up the steps and took over to the screen door, took hold of the knob. I said, "Fellow, what do you want? I live in there." And, no one answered me. In the meantime someone behind me said, "We want him, he is trying to get away from us." And these men came in after him. I said, "You all take him in the street." And, that was it.

* * * * *

Q. Do you see that person here in the Court room? The person who tried to get into your house at 53 R Street? A. Well, I don't know him.

* * * * *

64

REDIRECT EXAMINATION

BY MR. CAPUTY:

* * * * *

Q. Tell us exactly what that person was doing at your front door?

A. Only took hold of my door knob.

Q. And what did he do? A. Just took hold of the knob, just like he was going to walk in his own place.

Q. What did you say? A. I said, "Fellow, what do you want there?" I said, "I live in there." He never answered to me.

65 Q. Did you tell the police to get him out of there? A. I said when these men came in for him, I say, "You all take him in the street."

Q. Did you tell the police he didn't belong there? A. No, I didn't say that. I just said, "You all take him in the street."

* * * * *

WILLIAM P. BUTLER

* * * * *

DIRECT EXAMINATION

BY MR. CAPUTY:

Q. Will you state your name and profession? A. William P.

66 Butler. I am employed as a chemist by the Internal Revenue Service of the Treasury Department.

MR. DWYER: I will stipulate his qualifications, Your Honor.

THE COURT: Very well.

* * * * *

67 BY MR. CAPUTY:

Q. Now, will you tell the Court and jury what your findings were of each capsule contained in Government's Exhibit 1-a for identification?

A. I found that each one of the 229 capsules contained heroin hydrochloride, being a derivative of opium and a narcotic drug.

MR. CAPUTY: At this time, if Your Honor please, I would like to offer Government's Exhibit 1 and 1-a for identification, into evidence as Government's Exhibits 1 and 1-A.

MR. DWYER: No objection, Your Honor.

THE COURT: The exhibits will be admitted.

(Government's Exhibits 1 and 1-A were
received in evidence.)

* * * * *

68 MR. CAPUTY: The government rests, Your Honor.

* * * * *

73 MERVIN GREEN

* * * * *

DIRECT EXAMINATION

BY MR. DWYER:

* * * * *

74 Q. When you walked up the street were you still by yourself or
were you with somebody else? A. Well, I met a fellow by the name of
75 John Palmer as I came out the door.

Q. What happened after that -- you met Palmer? A. We started --
I started on walking toward my sister's like I said, and this automobile
rolled up and the two men shouted in the car. They did say, "Hey," and
at the same time they jumped out of the car and started running toward me.
So, I backed up on the lady's step and I did go up on the lady's step trying
to get out of the way of them. So when they came up there, he told me to
come off the step and I asked him what did he want. So, he said, "Come
on off the step."

And by this time he showed me a badge and grabbed me by my arm
and took me back to the car.

* * * * *

77 Q. All right, sir. Do you know where this Government Exhibit
1-A came from, or the envelope that looked like it that was shown to you
in the car? When the officer showed something like this to you in the car,
do you know where he got it? A. Well, I couldn't say where he got it.
He didn't get it off me like he say he did.

* * * * *

78 CROSS EXAMINATION - BY MR. CAPUTY:

81 Q. Now, you are the same Mervin Green who on April 22, 1950,
in the District of Columbia, was convicted of housebreaking, aren't you?

A. Convicted of housebreaking?

Q. Yes, sir? A. Yes, sir.

Q. And you are the same Mervin Green who in the District of Columbia was indicted, arrested and convicted after indictment on October 22, '53, for larceny from the mails and forgery of government checks, weren't you? A. Yes, sir, I was.

* * * * *

82

METRO KRENTSKY

* * * * *

BY MR. CAPUTY:

* * * * *

83

Q. Was that statement made freely and voluntarily by that individual? By the defendant? A. Well, we asked him who his source of supply was and he told us some man on P Street, that he walked from 66 -- from First Street all the way over to 6th Street on P Street and he would just walk in that block in that vicinity and from nowhere at all the man, his source of supply, would appear and come along side of him and would just tell him merely words that -- go around the corner, or where to meet

84

him. And that is where the defendant would meet the source of supply.

* * * * *

87

IRVIN W. BREWER

* * * * *

BY MR. CAPUTY:

* * * * *

Q. Was any statement made by the defendant to you there at headquarters? A. No signed statement, no, sir.

88

Q. Any oral statement about his source of supply? A. He told us at the same time that he could purchase narcotic drugs from a man around 6th and P, and sometimes the man would tell him to go around the corner, but he never did mention the man's name.

* * * * *

89

MR. DWYER: That's all.

JURY CHARGE

THE COURT: Ladies and gentlemen of the jury, the introduction of evidence having been completed in this case, it is now the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

Remember that the arguments made to you by Mr. Dwyer and Mr. Caputy just before we recessed for lunch are not evidence in the case. The evidence is the testimony that you heard from the lips of the witnesses sworn to tell the truth, plus the exhibits which the Court has admitted in evidence. Remember also that the attorneys' recollection of the evidence is not binding upon you, nor is the Court's recollection of the evidence binding upon you, if the Court has any occasion to refer to the evidence during the course of this charge.

When you retire to the jury room, you will take with you a copy of the indictment which has been returned by the grand jury in this case. An indictment is a rather formidable looking document, but an indictment is not evidence against a defendant. Remember, then, that this paper which you have before you in the jury room is not any evidence against this defendant. The sole purpose of the indictment is to advise the defendant of the charges which have been preferred against him, the charges which he must answer when he comes into court.

This indictment is drawn in three counts. It charges in the first count that on or about August 26, 1957, within the District of Columbia,

104 Mervin Green, that is, this defendant, purchased, sold, dispensed and distributed not in the original stamped package and not from the original stamped package a narcotic drug, that is, 229 capsules containing a mixture totaling about 432-1/2 grains of heroin hydrochloride and milk sugar. The essence of this first count of the indictment is that this defendant purchased 229 capsules of heroin hydrochloride, a narcotic drug, not in the original stamped package and not from the original stamped package.

This section of the indictment is returned under a provision of the

United States Code which defines this offense as follows:

"It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package, and the absence of appropriate tax paid stamps from the narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

The second count of the indictment refers to the same incident and to the same narcotic drugs. The second count charges that on or about August 105 26, 1957, within the District of Columbia, Mervin Green facilitated the concealment and sale of a narcotic drug, that is, 229 capsules containing a mixture totaling about 432-1/2 grains of heroin hydrochloride and milk sugar, after the said heroin hydrochloride had been imported with the knowledge of Mervin Green into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

The second count of the indictment is returned under a separate or different section of the United States Code, which provides:

"If any person, fraudulently or knowingly, imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law, shall violate this section of the law."

This section of the statute further provides:

106 "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

You may now ask yourselves: why is this defendant charged in two separate counts of the indictment with two separate offenses when the

same drug is involved in both counts of the indictment and the counts refer to the same indictment?

It is the law of this jurisdiction that when a person does a single act which violates two or more laws, he may be prosecuted for the violation of each of those laws, even though he did but a single act. So that these two separate counts in the indictment charge two separate and distinct violations of the laws of the United States, and consequently, the Government has the right to charge the defendant with a violation of each of the laws.

The third count of the indictment charges that on or about August 26, 1957, within the District of Columbia, Mervin Green did unlawfully attempt to enter a certain private dwelling, that is, 59 R Street, Northwest, against the will of Mary Briggs, the lawful occupant thereof.

107

This third count of the indictment is returned under a section of the Penal Code of the District of Columbia which defines a crime of unlawful entry as follows:

"Any person who without lawful authority shall enter or attempt to enter any private dwelling against the will of the lawful occupant thereof, shall be deemed guilty of a violation of this offense."

You must when you go into the jury room in connection with this case return a separate verdict as to each of the three counts of this indictment. In effect, this indictment charges the commission of three separate offenses, and you must with reference to each of the three counts return a separate verdict. This means that on the first count of the indictment your verdict may be either guilty or not guilty; on the second count of the indictment, your verdict may be either guilty or not guilty, and on the third count of the indictment your verdict may be either guilty or not guilty. Each count of the indictment stands alone for your purposes. You must consider each one individually and render a separate verdict on each of the three counts of the indictment.

108

The law is that the defendant is presumed to be innocent. This is one of the high marks of our system of jurisprudence, because it

means that the defendant is not required to prove his innocence, but, rather, the law presumes that he is innocent. This principle of our criminal law makes the Anglo-American system of law unique in the world, because in most countries when a defendant is charged with a crime, he is brought into court and is required to prove that he is innocent of that crime. This is not the practice which we follow in the United States, however. We say, and I repeat to you, the defendant is presumed to be innocent. This means that the burden of proof in this criminal case is upon the Government, which must prove the defendant guilty beyond a reasonable doubt. This means, in turn, that unless the Government maintains this burden of proof and proves beyond a reasonable doubt to your satisfaction that this defendant committed each and every element of the offenses with which he is charged, then you, the jury, must find the defendant not guilty.

I said to you a moment ago that the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt, but this does not mean beyond all doubt whatsoever. In other words, the Government must prove the defendant guilty to a moral certainty, but not to an absolute or a mathematical certainty.

109 As its name implies, a reasonable doubt is a doubt which is predicated upon reason, that is, a doubt for which you can give a reason to yourselves, as contrasted with a doubt which might be predicated upon prejudice or sympathy or any other emotional element or factor in your thinking. In the final analysis, proof beyond a reasonable doubt means simply this. If after a fair and impartial comparison and consideration of all of the evidence in the case you can truthfully say to yourselves that you are not convinced of the defendant's guilt, then you have a reasonable doubt and your verdict should be not guilty. But if after you make this fair and impartial comparison and consideration of all the evidence in the case you can truthfully say to yourselves that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more important and weighty matters in the course of your own daily lives, then you have no reasonable doubt, and your verdict should

be guilty.

In determining whether the Government has established the charge against this defendant, you must consider and weigh the testimony of all of the witnesses who have appeared before you, the witnesses offered by the Government and the testimony through the witness the defendant, who testified in his own behalf.

110 You are the sole judges of the credibility of these witnesses. This means that you must determine which of these witnesses you are going to believe and to what extent you are going to believe them. In determining how much credence, how much credibility you will give to the testimony of each witness, you have the right to consider the demeanor of each witness on the witness stand, his or her manner of testifying, whether the witness impresses you as having an accurate memory and recollection of the facts about which the witness is testifying, whether the witness displays any favor or prejudice towards one side or the other and, most important of all, whether the witness impresses you as being a truth-telling individual.

In addition, you have the right to draw upon the past experiences of your lives and to bring into your consideration of the credibility of these witnesses any factors that you have heretofore found important in making the day-to-day decisions which you have to make as to whether people are telling you the truth or are telling a falsehood. I think as we go through life we individually develop little standards by which we measure a person's truthfulness from time to time, and you are entitled in considering the credibility of the witnesses in this case to draw upon all of those elements which you have found to be important in reaching a decision as to whether a particular person is telling the truth or is telling a falsehood.

111 If you believe that any witness wilfully testified falsely as to some material fact concerning which that witness could not possibly be mistaken, you are then at liberty to disregard the entire testimony of that witness or any part of the testimony of that witness.

You are further instructed that while the law makes this defendant

a competent witness in his own behalf, you, nevertheless, have the right to take into consideration his situation, all of the circumstances which surround him, his interest in the result of your verdict, and you should give to his testimony such weight as in your judgment it is fairly entitled to receive.

The District of Columbia Code provides: "No person shall be incompetent to testify in either civil or criminal proceedings by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness."

This defendant, as I recall his testimony upon cross examination, admitted a conviction on April 22, 1950 for housebreaking and a conviction in October, 1953, of a charge of larceny and forgery of Government checks. What does this mean?

This section of the District of Columbia Code which I just read to you means that the fact that this defendant has admitted prior convictions may not be considered by you as any evidence whatsoever that he committed the present offense. You may consider this prior record only
112 insofar as, in your opinion, it affects the defendant's credibility as a witness in the present case.

There has been some discussion in the case about a man named John Arthur Palmer or "Jap" Palmer, and some question has been raised as to why he is not here as a witness today, and some suggestion has been made to you that his absence has some significance in evidence. The law is that if a witness is peculiarly available to one side in a case, the absence of that witness creates a presumption that his testimony would be unfavorable to the side failing to produce the witness. This rule must, however, be applied with caution, since the subpoena facilities of the Court are equally available to both parties in this case. This rule, then, applies basically to those situations in which one side has knowledge of a witness which knowledge is not possessed by the opposing side.

You are the sole, the exclusive judges of the facts in this case. You are admonished not to permit your judgment, your reason or your intelligence to be swayed by prejudice, by bias, by ill-will or by sympathy.

In other words, you should not be influenced in reaching your verdict by your feelings or your emotions. Your verdict should be reached in accordance with the solemn oath you took that you would well and truly try this case and a true verdict render in accordance with the evidence and

113 in accordance with the law as it is outlined to you by the Court.

Your verdict must be a unanimous one. This means, of course, that all twelve of you must concur in your verdict. I repeat, you must find a separate verdict on each of the three counts of the indictment.

Your verdict on each count may be either guilty or not guilty.

Will counsel approach the bench.

(At the bench:)

* * * * *

THE COURT: Mr. Dwyer, do you request any further charge?

MR. DWYER: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. DWYER: No, Your Honor.

* * * * *

116 THE CLERK: Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: We have.

THE CLERK: What say you of the defendant Mervin Green as to Count No. 1?

THE FOREMAN: Guilty.

THE CLERK: As to Count No. 2?

THE FOREMAN: Guilty.

THE CLERK: As to Count No. 3?

THE FOREMAN: Not guilty.

* * * * *

342

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14378

MERVIN GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OLIVER GASCH,
United States Attorney.

CARL W. BELCHER,
VICTOR W. CAPUTY,
NATHAN J. PAULSON,
Assistant United States Attorneys.

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUN 19 1958

Joseph W. Stewart
CLERK

QUESTIONS PRESENTED

Where the facts disclose that two police officers, assigned to investigate narcotics activities, seek to interrogate a person in the company of a known narcotic addict; that such person immediately flees; and while so doing commits a crime in the presence of the officers, in the opinion of the appellee the following questions are presented:

1. Was there probable cause for the arrest of appellant without warrant?
2. Did the trial court err by refusing to suppress the narcotics obtained by the search which was incidental to a valid arrest.
3. Does appellant, having disclaimed ownership or possession of the narcotics, have standing to move for an order of suppression.

(1)

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14378

MERVIN GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Prior to the filing of an indictment, appellant, pro se, filed a motion to suppress evidence obtained as a result of an alleged illegal search and seizure (J. A. 1). On November 4, 1957, appellant was indicted for violation of 26 U. S. C. 4704a, 21 U. S. C. 174 and 22 D. C. C. 3102 in that he violated the narcotics laws and attempted to illegally enter certain premises against the will of the lawful occupant (J. A. 2). Appellant entered a plea of not guilty on November 8, 1957 (R. 127). Thereafter, his counsel filed a motion to suppress (J. A. 3). This motion was denied on November 15, 1957, without prejudice (J. A. 4). Appellant, pro se, again filed a motion to suppress on December 31, 1957 (J. A. 4) and sent a letter to the court requesting a rehearing on the original motion (J. A. 7). This was denied on January 2, 1958 (J. A. 7). Another motion to suppress was denied on January 10, 1958 (J. A. 8). Upon the trial appellant was found guilty on the narcotics counts and not guilty on the unlawful entry count

(J. A. 8). A motion for a new trial was filed on February 13, 1958 (J. A. 9), but was denied on February 26, 1958 (J. A. 7). Thereafter, appellant was sentenced to a term of imprisonment of from three years to ten years on Count One and six years on Count Two, the sentences to run concurrently (J. A. 10). A notice of appeal was filed one day before the judgment and commitment order was filed (J. A. 9).

Metro Krenitsky testified that he was a member of the Metropolitan Police Department; that on August 26, 1957, at about 11:15 a. m. he was on assignment with his partner Officer Brewer, investigating narcotic activities in the vicinity of North Capitol and R Streets in the District of Columbia (J. A. 12); that they observed two men walking west on the north side of the street, one of whom was known to them as a "narcotic addict"; that they stopped the car and called the two men over to the car (J. A. 12); that the narcotic addict came towards the car but appellant immediately started to run (J. A. 13); that he ran into the front yard of a house and tried to get into the door (J. A. 13); that a woman sitting on a bench told the defendant to "get out of there" because "You don't belong there" (J. A. 13). He further testified that Brewer had proceeded after appellant and when he arrived to assist Brewer he identified himself as a police officer but appellant continued to "struggle" (J. A. 13); that the lady in the yard told the officers to remove appellant from the premises (J. A. 13). Upon cross-examination he stated that when they called the addict over, the appellant "just ran east and tried to get into premises 53 R Street" (J. A. 15).

Irvin W. Brewer corroborated Krenitsky's testimony regarding the approach to appellant on the day in question. He stated that as "I got out of the car in an effort to ask [Palmer] about his narcotic activity this defendant ran up the steps and past a lady, Mrs. Mary Briggs, who was seated on the bench at 53 R Street, at which time she asked him 'where are you going, get away from the door' * * * then he grabbed hold of the door and tried to open the door and at that time, I placed him under arrest" (J. A. 16, 17). He stated that Mrs. Briggs said "Please take him away from here; he doesn't live there" (J. A. 17). Both officers testified that the

search took place after the arrest but differed as to whether it was on or off the premises (J. A. 13, 20). Appellant had 229 capsules of heroin in his possession (R. 42, 43). Brewer, after appellant ran, proceeded after him "walking at a fast gait" (J. A. 19) because "I didn't have to run" (J. A. 20). When asked "Why did you arrest the defendant, Officer?" (J. A. 20) the officer stated "Well, when I found out he didn't live there, we arrested him for attempted unlawful entry" (J. A. 20).

Mrs. Mary Briggs testified as to her version of the events (J. A. 21, 22).

Appellant testified in his own behalf and stated that when the officers started running toward [him] he tried to get out of "their way" by backing up on the lady's step (J. A. 23). He denied any knowledge of the brown envelope and stated "He didn't get it off me like he say he did" (J. A. 23). He admitted of two prior convictions, one of housebreaking and one of larceny from the mails (J. A. 23, 24).

The charge was full and complete and appellant made no objections thereto and stated he had none (J. A. 25-31).

STATUTES INVOLVED

Title 22, United States Code, Section 174, provides:

Same: penalty: evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten

or more than forty years, and in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26, United States Code, Section 4704 (a)—General requirement provides:

It shall be unlawful for any person to purchase, sell dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Title 22, District of Columbia Code, Section 3102 provides:

Unlawful entry on private property.—Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property, or part of such dwelling, building or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$100 or imprisonment in the jail for not more than six months, or both, in the discretion of the court.

Constitution of the United States of America, Article IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

SUMMARY OF ARGUMENT

Police officers assigned to investigate narcotics activities have a right to seek to interrogate persons in the company of known narcotics addicts. When they are interrupted from this duty by immediate flight of the person, they have a duty to continue their efforts and if in the course of their attempt so to do the fleeing person commits a crime in their presence, they have probable cause to arrest without warrant.

A search and seizure incidental to a valid arrest is reasonable and does not violate the provisions of the Fourth Amendment of the Constitution.

Where appellant denies ownership, possession or any proprietary interest in property, he may not move for an order of suppression on the claim that his personal rights have been violated.

ARGUMENT

There was probable cause to arrest appellant because a crime had been committed in the police officer's presence. A search and seizure made incidental to a valid arrest does not violate any constitutional rights

A. The arrest was legal

The testimony of the police officers, clearly disclosed that when they halted their car, they *merely called over* to the two men (J. A. 12, 16). At that point, and under those circumstances, there was no imminent danger threatening appellant, for all this occurred at eleven o'clock in the morning with people on the streets. It is, however, significant that although the narcotic addict stopped and proceeded towards the car "The [appellant] immediately started to run and he ran into the yard of 53 R Street NW., and he tried to get into the door" (J. A. 13). The police officer testified that when he entered the yard and continued therein, a woman seated out in front said to appellant "You don't belong here, get out of here" (J. A. 13). We submit that under these circumstances where police offi-

cers, assigned to investigate narcotic activity, see a narcotic addict in the company of another person, they have a right and a duty to investigate. This Court has held in *Ellison v. United States*, 93 U. S. App. D. C. 1, 206 F. 2d 476 (1953), and *Fisher v. United States*, 92 U. S. App. D. C. 247, 205 F. 2d 702 (1953), that such duty includes the right to approach, confront, and interrogate. See also *Beail v. District of Columbia*, 82 A. 2d 765, 768 (Mun. Ct. App., 1951). The premise for such an approach is a quest for possible criminal activity. Such a quest inherently involves some displacement in the life of such individuals so contacted. We submit, however, that such displacement is not unreasonable nor abhorrent to the laws of the United States.

Appellant's peculiar conduct alone, where, according to the police testimony, no threats were made, gave rise to a duty upon the police officers to question and interrogate. Cf. *Price v. United States*, D. C. Mun. App. 119 A. 2d 718, 720 (1956). Under the circumstances heretofore described not only was the police officer not obliged to end the initial attempted inquiry which had been frustrated by appellant's flight but he was under a duty to continue his activity. Here the conduct of the police officer who testified he proceeded after appellant "walking at a fast gait" (J. A. 19) because he didn't have to run (J. A. 20), clearly meets the standard of reasonableness required by the test of the "reasonable, cautious, and prudent police officer under the circumstances of the moment." *Bell v. United States*,—U. S. App. D. C.—, —F. 2d—(No. 13684, decided January 23, 1958) and was clearly within the rule of "Reasonable—for—the—purpose—of—information," *Trilling v. United States*,—U. S. App. D. C.—,—F. 2d—(Nos. 13069, 13165, 13212, decided April 17, 1958), at page 48 (opinion, Prettyman, J.).

When asked why he arrested appellant, the police officer replied "Well, when I found he didn't live there, we arrested him for attempted unlawful entry" (J. A. 20). This statement was given on cross-examination after the officer had testified that the woman in the yard had advised appellant to get off the premises because he didn't belong there and that the

appellant failed to comply with that request but proceeded thereafter to attempt to enter the house.

We submit that under all these circumstances the arrest was legal because a crime was committed in the presence of the police officers. This Court, as recently as this year, has stated that a search and seizure incidental to a valid arrest is legal and does not violate the Fourth Amendment to the Constitution. *Bell v. United States*, *supra*; see also *Jeffers v. United States*, 88 U. S. App. D. C. 58, 187 F. 2d 499 (1950), *aff'd*, 342 U. S. 48.

Appellant contends that the attempt to enter the premises was caused by a chain reaction instituted by the police; and consequently, the arrest was illegal. We submit that *Hester v. United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 989 (1924); *Lee v. United States*, 95 U. S. App. D. C. 156, 221 F. 2d 29 (1954). *Cf. United States v. McNeil*, 91 A. 2d 849 (Mun. Ct. App. 1952); *O'Neal v. United States*, 95 U. S. App. D. C. 387, 222 F. 2d 411; *Brady v. United States*, 148 F. 2d 394 (9th Cir. 1945), refute this contention. If the officers firing their pistols near Hester did not cause him to drop his jug, and the officers' self-identification did not cause Lee to drop evidences of a crime from an automobile then in the instant case, the officers' attempt to interrogate did not cause appellant to attempt to illegally enter a house.

B. Appellant, having disclaimed any ownership in the property alleged to have been illegally seized, cannot now raise the issue that there was an illegal search and seizure made

It has been held by this Court and others that where a defendant does not claim any ownership in property seized, he cannot claim protection under the Fourth Amendment of the Constitution of the United States. *Gibson v. United States*, 80 U. S. App. D. C. 81; *Cradle v. United States*, 85 U. S. App. D. C. 315, 178 F. 2d 962, and *Irvine v. California*, 347 U. S. 136. Under this rule of law, the burden is upon one asserting a violation of his constitutional rights to prove ownership. *United States v. Shelton*, 59 F. Supp. 273 (D. C. E. D. Ky. 1945), and *United States v. Daniels*, 10 F. R. D. 225 (D. C. N. J. 1950). Appellant denied any ownership, proprietary interest or possession of the narcotics recovered as a result of the arrest. On

direct examination he stated "Well, I couldn't say where he got it. He didn't get it off me like he say he did" (J. A. 23).

This Court has expressed its view upon this subject in the case of *Harvey v. United States*, 90 U. S. App. D. C. 167, 193 F. 2d 928 (1952), *cert. denied*, 343 U. S. 927, where it said:

* * * However, in our opinion, there is an underlying reason why appellants were not entitled to exclusion of the evidence. They never claimed that it was seized by the police, or that they owned or possessed it.

Were appellant to now claim possession he would fall within the principle set forth in *Connolly v. Medalie*, 58 F. 2d 629 (2nd Cir. 1932), where the Court, speaking through L. Hand, J., said (p. 633):

* * * Men may wince at admitting they were the owners or in possession of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve.

It is apparent therefore, that appellant, having failed to claim possession and in fact, having affirmatively denied possession, ownership or seizure, cannot claim that his rights under the Fourth Amendment were violated. See *Accardo v. United States*, — U. S. App. D. C. —, 247 F. 2d 568 (1957), *cert. denied*, 355 U. S. 898.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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